

SECOND REGULAR SESSION

# HOUSE BILL NO. 1198

## 97TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE FUNDERBURK.

5069H.011

D. ADAM CRUMBLISS, Chief Clerk

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### AN ACT

To repeal sections 67.1830 and 67.5104, RSMo, and to enact in lieu thereof two new sections relating to municipal utility poles.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Sections 67.1830 and 67.5104, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 67.1830 and 67.5104, to read as follows:

67.1830. As used in sections 67.1830 to 67.1846, the following terms shall mean:

(1) "Abandoned equipment or facilities", any equipment materials, apparatuses, devices or facilities that are:

(a) Declared abandoned by the owner of such equipment or facilities;

(b) No longer in active use, physically disconnected from a portion of the operating facility or any other facility that is in use or in service, and no longer capable of being used for the same or similar purpose for which the equipment, apparatuses or facilities were installed; or

(c) No longer in active use and the owner of such equipment or facilities fails to respond within thirty days to a written notice sent by a political subdivision;

(2) "Degradation", the actual or deemed reduction in the useful life of the public right-of-way resulting from the cutting, excavation or restoration of the public right-of-way;

(3) "Emergency", includes but is not limited to the following:

(a) An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that prevents or significantly jeopardizes the ability of a public utility to provide service to customers;

(b) An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that results or could result in danger to the public or a material delay or hindrance

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

18 to the provision of service to the public if the outage, cut, rupture, leak or any other such failure  
19 of public utility facilities is not immediately repaired, controlled, stabilized or rectified; or

20 (c) Any occurrence involving a public utility facility that a reasonable person could  
21 conclude under the circumstances that immediate and undelayed action by the public utility is  
22 necessary and warranted;

23 (4) "Excavation", any act by which earth, asphalt, concrete, sand, gravel, rock or any  
24 other material in or on the ground is cut into, dug, uncovered, removed, or otherwise displaced,  
25 by means of any tools, equipment or explosives, except that the following shall not be deemed  
26 excavation:

27 (a) Any de minimis displacement or movement of ground caused by pedestrian or  
28 vehicular traffic;

29 (b) The replacement of utility poles and related equipment at the existing general  
30 location that does not involve either a street or sidewalk cut; or

31 (c) Any other activity which does not disturb or displace surface conditions of the earth,  
32 asphalt, concrete, sand, gravel, rock or any other material in or on the ground;

33 (5) "Management costs" or "rights-of-way management costs", the actual costs a political  
34 subdivision reasonably incurs in managing its public rights-of-way, including such costs, if  
35 incurred, as those associated with the following:

36 (a) Issuing, processing and verifying right-of-way permit applications;

37 (b) Inspecting job sites and restoration projects;

38 (c) Protecting or moving public utility right-of-way user construction equipment after  
39 reasonable notification to the public utility right-of-way user during public right-of-way work;

40 (d) Determining the adequacy of public right-of-way restoration;

41 (e) Restoring work inadequately performed after providing notice and the opportunity  
42 to correct the work; and

43 (f) Revoking right-of-way permits.

44 Right-of-way management costs shall be the same for all entities doing similar work.  
45 Management costs or rights-of-way management costs shall not include payment by a public  
46 utility right-of-way user for the use or rent of the public right-of-way, degradation of the public  
47 right-of-way or any costs as outlined in paragraphs (a) to [(h)] **(f)** of this subdivision which are  
48 incurred by the political subdivision as a result of use by users other than public utilities, the  
49 attorneys' fees and cost of litigation relating to the interpretation of this section or section  
50 67.1832, or litigation, interpretation or development of any ordinance enacted pursuant to this  
51 section or section 67.1832, or attorneys' fees and costs in connection with issuing, processing,  
52 or verifying right-of-way [permit] **permits** or other applications or agreements, or the political  
53 subdivision's fees and costs related to appeals taken pursuant to section 67.1838. In granting or

54 renewing a franchise for a cable television system, a political subdivision may impose a franchise  
55 fee and other terms and conditions permitted by federal law;

56 (6) "Managing the public right-of-way", the actions a political subdivision takes, through  
57 reasonable exercise of its police powers, to impose rights, duties and obligations on all users of  
58 the right-of-way, including the political subdivision, in a reasonable, competitively neutral and  
59 nondiscriminatory and uniform manner, reflecting the distinct engineering, construction,  
60 operation, maintenance and public work and safety requirements applicable to the various users  
61 of the public right-of-way, provided that such rights, duties and obligations shall not conflict  
62 with any federal law or regulation. In managing the public right-of-way, a political subdivision  
63 may:

64 (a) Require construction performance bonds or insurance coverage or demonstration of  
65 self-insurance at the option of the political subdivision or if the public utility right-of-way user  
66 has twenty-five million dollars in net assets and does not have a history of permitting  
67 noncompliance within the political subdivision as defined by the political subdivision, then the  
68 public utility right-of-way user shall not be required to provide such bonds or insurance;

69 (b) Establish coordination and timing requirements that do not impose a barrier to entry;

70 (c) Require public utility right-of-way users to submit, for right-of-way projects  
71 commenced after August 28, 2001, requiring excavation within the public right-of-way, whether  
72 initiated by a political subdivision or any public utility right-of-way user, project data in the form  
73 maintained by the user and in a reasonable time after receipt of the request based on the amount  
74 of data requested;

75 (d) Establish right-of-way permitting requirements for street excavation;

76 (e) Establish removal requirements for abandoned equipment or facilities, if the  
77 existence of such facilities prevents or significantly impairs right-of-way use, repair, excavation  
78 or construction;

79 (f) Establish permitting requirements for towers and other structures or equipment for  
80 wireless communications facilities in the public right-of-way, notwithstanding the provisions of  
81 section 67.1832;

82 (g) Establish standards for street restoration in order to lessen the impact of degradation  
83 to the public right-of-way; and

84 (h) Impose permit conditions to protect public safety;

85 (7) "Political subdivision", a city, town, village, county of the first classification or  
86 county of the second classification;

87 (8) "Public right-of-way", the area on, below or above a public roadway, highway, street  
88 or alleyway in which the political subdivision has an ownership interest, but not including:

89 (a) The airwaves above a public right-of-way with regard to cellular or other nonwire  
90 telecommunications or broadcast service;

91 (b) Easements obtained by utilities or private easements in platted subdivisions or tracts;

92 (c) Railroad rights-of-way and ground utilized or acquired for railroad facilities; or

93 (d) **Poles**, pipes, cables, conduits, wires, optical cables, or other means of transmission,  
94 collection or exchange of communications, information, substances, data, or electronic or  
95 electrical current or impulses utilized by a municipally owned or operated utility pursuant to  
96 chapter 91 or pursuant to a charter form of government;

97 (9) "Public utility", every cable television service provider, every pipeline corporation,  
98 gas corporation, electrical corporation, rural electric cooperative, telecommunications company,  
99 water corporation, heating or refrigerating corporation or sewer corporation under the jurisdiction  
100 of the public service commission; every municipally owned or operated utility pursuant to  
101 chapter 91 or pursuant to a charter form of government or cooperatively owned or operated  
102 utility pursuant to chapter 394; every street light maintenance district; every privately owned  
103 utility; and every other entity, regardless of its form of organization or governance, whether for  
104 profit or not, which in providing a public utility type of service for members of the general  
105 public, utilizes pipes, cables, conduits, wires, optical cables, or other means of transmission,  
106 collection or exchange of communications, information, substances, data, or electronic or  
107 electrical current or impulses, in the collection, exchange or dissemination of its product or  
108 services through the public rights-of-way;

109 (10) "Public utility right-of-way user", a public utility owning or controlling a facility  
110 in the public right-of-way; and

111 (11) "Right-of-way permit", a permit issued by a political subdivision authorizing the  
112 performance of excavation work in a public right-of-way.

67.5104. 1. As used in this section, "pole attachment" means an attachment by **an**  
2 **attaching entity, including** a video service provider, a telecommunications **provider** or other  
3 communications-related service provider to a pole owned **or controlled** by a municipal utility[,  
4 but not a wireless antenna attachment or an attachment by a wireless communications provider  
5 to a pole] **or municipality. A municipal utility or municipality may only deny an attaching**  
6 **entity access to the utility's poles on a nondiscriminatory basis only if there is insufficient**  
7 **capacity or for reasons of safety and reliability and if the attaching entity will not resolve**  
8 **the issue.**

9 2. Notwithstanding sections 67.1830 to 67.1846, any pole attachment fees, terms, and  
10 conditions, including those related to the granting or denial of access, demanded by a municipal  
11 utility pole owner or controlling authority of a municipality shall be nondiscriminatory, just, and  
12 reasonable and shall not be subject to any required franchise authority or government entity

13 permitting, except as provided in this section. A pole attachment rental fee shall be calculated  
14 on an annual, per-pole basis. Such rental fee shall be considered nondiscriminatory, just, and  
15 reasonable if it is agreed upon by the parties or, in the absence of such an agreement, based on  
16 cost but in no such case shall such fee so calculated be greater than the fee which would apply  
17 if it were calculated in accordance with the cable service rate formula referenced in 47 U.S.C.  
18 Sec. 224(d) as applied by the Federal Communications Commission[, except as permitted by  
19 subsection 3 of this section.

20 3. Either party may seek review of any fee, term, or condition by means of binding  
21 arbitration conducted by a single arbitrator mutually agreeable to the parties or, in the absence  
22 of such an agreement, by means of binding arbitration conducted by the American Arbitration  
23 Association. An arbitrator's award regarding fees shall be confined to ensuring that the  
24 municipal utility pole owner recovers its direct costs and a reasonable share of the fully allocated  
25 costs attributable to the pole attachment, and that the fee may exceed the fee resulting from the  
26 application of the cable service rate formula referenced in this section only if based on an express  
27 written finding stated in the award that such award is based on competent and substantial  
28 evidence that the revenues produced under the cable service rate formula and other payments  
29 made by the service provider do not sufficiently recover the direct costs and a reasonable share  
30 of the fully allocated costs attributable to the pole attachment. In addition, a municipal pole  
31 owner may be authorized to exceed the rate of return cost components of the Federal  
32 Communications Commission formula referenced in this section if necessary to comply with  
33 Article X of the Missouri Constitution. Pending the arbitrator's rendering of such an award, the  
34 last existent rental fee applicable to the pole attachment shall remain in place and binding upon  
35 both parties] . **In the event of a dispute between the parties, either party may bring an**  
36 **action for review in any court of competent jurisdiction. The court shall rule on any such**  
37 **petition for review in an expedited manner by moving the petition to the head of the docket**  
38 **consistent with subsection 2 of this section. Nothing shall deny any party the right to a**  
39 **hearing before the court.**

40 4. Where no [prior] contract exists between an attaching entity and the municipal utility  
41 pole owner **or controlling authority of a municipality**, and a dispute between a municipal  
42 utility pole owner **or controlling authority of a municipality** and an attaching entity  
43 [exclusively] concerns the per-pole fee, then the attaching entity may proceed with its  
44 attachments during the pendency of the [arbitration under the agreed-upon terms and conditions]  
45 **dispute at a rental rate of no more than as set forth in subsection 2 of this section. The**  
46 **attaching entity shall comply with applicable and reasonable engineering and safety**  
47 **standards and shall hold the municipal pole owner or controlling authority of the**

48 **municipality harmless for any liabilities or damages incurred that are caused by the**  
49 **attaching entity.**

50         5. The provisions of this section shall not supersede existing pole attachment agreements  
51 established prior to [August 28, 2013] **the effective date of this act.**

52         6. Nothing in this section shall be construed as conferring any jurisdiction or authority  
53 to the public service commission, **or any state agency**, to regulate either the fees, terms, or  
54 conditions for pole attachments, or for any state agency to assert any jurisdiction over [pole  
55 attachments] **attachments to poles** regulated by 47 U.S.C. Sec. 224.

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